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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL SUTHERLAND, Defendant and Appellant.	B239405 (Los Angeles County Super. Ct. No. YA076187)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed.

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Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

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Michael Sutherland appeals from his convictions on three sex offense charges involving a minor child. We affirm.

BACKGROUND

The amended information charged Sutherland with two counts of committing a lewd act upon a child in violation of subdivision (a) of Penal Code section 288 (counts 1 and 3) and one count of continuous sexual abuse of a child in violation of subdivision (a) of Penal Code section 288.5. It also alleged as to count 2, pursuant to Penal Code section 1203.066, subdivision (a)(8), that the victim was under the age of 14 years and that Sutherland engaged in substantial sexual conduct with her.

Sutherland pleaded not guilty and denied all allegations. A jury found him guilty on all counts and found the special allegation true.

The trial court denied Sutherland's motion for new trial, denied probation, and sentenced Sutherland to 20 years in prison, calculated as follows: the high term of 16 years as to count 2, plus two years (one-third of the mid-term) as to each of counts 1 and 3, all sentences to run consecutively. The court also credited Sutherland with 979 days of presentence custody (852 days actual time plus 127 days good time/work time) and imposed various statutory fines and fees. Sutherland timely appealed.

The evidence introduced at trial showed the following facts: Victim O.D. was born in September 1994. Her mother met Sutherland in 1996 or 1997 and dated him for a number of years. At all relevant times, Sutherland had keys to the residence where O.D. and her mother lived, and he would look after O.D. or drive her to or from daycare when her mother was at work.

When O.D. was seven years old, Sutherland began touching her leg, upper thigh, chest (both over and under her clothes), and buttocks in a manner that made her feel uncomfortable. On more than one occasion from 2001 to 2003, he also rubbed her vagina (over her clothes).

From 2003 to 2006, Sutherland continued to touch O.D.'s vagina (over and under her clothes), chest (over and under her clothes), and buttocks (over her clothes). He also

rubbed his penis against her vagina on multiple occasions, orally copulated her on multiple occasions and forced her to orally copulate him on multiple occasions, masturbated in front of her more than once, showed her pornographic films, and licked and bit her neck, chest, and back, leaving bite marks that would hurt when she showered.

DISCUSSION

I. Propensity Evidence

At trial, the prosecution introduced the testimony of Sutherland's daughter, S.S., concerning his sexual misconduct with her when she was 11. After Sutherland and S.S.'s mother separated, S.S. lived with Sutherland for approximately one month. Sutherland and S.S. slept together in the only bed in the apartment, and Sutherland began to touch her breasts and vagina; on more than one occasion, he fondled and kissed her breasts under her clothes. He also forced her to orally copulate him. On one occasion, he forced her to smoke a marijuana cigarette, and he then inserted his finger in her vagina. Sutherland objected to the admission of S.S.'s testimony, but the trial court admitted it pursuant to Evidence Code section 1108, which provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

On appeal, Sutherland challenges the admission of this evidence on two grounds. First, he argues that Evidence Code section 1108 on its face violates due process. He also recognizes, however, that the California Supreme Court has held that Evidence Code section 1108 does not violate due process (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*)), and he concedes that we are bound by that holding (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). We accordingly reject Sutherland's argument that Evidence Code section 1108 on its face violates due process.

Sutherland also argues that the trial court abused its discretion by determining that S.S.'s testimony was admissible under Evidence Code section 352 and hence under Evidence Code section 1108. Under Evidence Code section 352, the trial court "in its

discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The court's ruling on the admission or exclusion of evidence under Evidence Code section 352 "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' (*People v. Jordan* (1986) 42 Cal.3d 308, 316 [228 Cal.Rptr. 197, 721 P.2d 79].)" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In *Falsetta*, the Supreme Court stated that, in deciding whether to admit evidence of prior sexual offenses under Evidence Code section 1108, "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.)

In the instant case, the trial court expressly considered those factors before deciding to admit S.S.'s testimony. Having considered the trial court's analysis, we conclude that it was not arbitrary, capricious, or patently absurd.

Sutherland argues nonetheless that the court abused its discretion because S.S.'s testimony was of limited probative value. In particular, he contends that "the uncharged incidents involved contact with a ten year old girl for a one month period while the current episode involved various forms of sexual contact—both under and over clothing—[with] a young girl over a long period of time when she was between the approximate ages of 7 and 11 years old," that "[t]he prior acts with [S.S.] were also inflammatory because they involved sexual acts with a vastly underage girl," and that "the prior and current acts were remote in time."

We are not persuaded. In general, evidence of prior crimes "'is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*.' . . . [Citations.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 631.) The different time periods (one month versus several years) do not significantly undermine the probative value of S.S.'s testimony. S.S.'s age during Sutherland's sexual contact with her was within the range of O.D.'s ages during Sutherland's sexual contact with O.D., so that constitutes a similarity rather than a difference. Sutherland's conduct with S.S. was no more inflammatory than his charged conduct with O.D., and *any* conduct that was sufficiently similar to his conduct with O.D. to be admissible would be similarly inflammatory. And the length of time between the conduct with S.S. and the beginning of the conduct with O.D. (approximately eight years) is not sufficient to render S.S.'s testimony inadmissible. (See, e.g., *People v. Frazier* (2001) 89 Cal.App.4th 30, 41.)

For all of the foregoing reasons, we conclude that the trial court did not exercise its discretion in an arbitrary, capricious, or patently absurd manner by admitting S.S.'s testimony.

II. Instructional Error

Over defense objection, the trial court allowed the prosecution to present expert testimony concerning "child sexual abuse accommodation syndrome" (CSAAS), which describes the manner in which some children respond to sexual abuse, including delayed disclosure. The court consequently had a sua sponte duty to instruct the jury concerning the proper use of such evidence. (*People v. Housley* (1992) 6 Cal.App.4th 947, 958-959.) The court discharged that duty by instructing the jury with CALCRIM No. 1193:

"You have heard testimony from . . . Jayme Bernfeld regarding child sexual abuse accommodation syndrome. [¶] Dr. Bernfeld's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not the conduct of [O.D.] and [S.S.] was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of their testimony."

On appeal, Sutherland does not argue that the expert testimony concerning CSAAS should not have been admitted. Rather, he argues that the final sentence of CALCRIM No. 1193, quoted above, "violates appellant's federal constitutional rights to due process and a fair trial." We conclude that the argument lacks merit.

According to Sutherland, the sentence in question "creates a mandatory presumption that, if the jury finds that the victim's reactions based on the evidence are consistent with the CSAAS theory, then it should or could conclude that a molestation did in fact occur." In the alternative, Sutherland argues that the sentence in question created a rebuttable presumption because it "told the jury that it could presume the elements of the crime were proved based on the CSAAS evidence," and he further argues that "[e]ven if a presumption was not created, the jury could still conclude that this had been proved because the jury was then permitted to believe that the burden was shifted to the defendant to prove that the defendant did not engage in the prohibited acts."

We disagree. No part of CALCRIM No. 1193 creates any presumptions, conclusive or rebuttable, or otherwise shifts the burden of proof. The final sentence, to which Sutherland objects, merely informs the jury that it *may* consider the CSAAS evidence for purposes of deciding only (1) whether the conduct of a putative molestation victim is consistent with the conduct of someone who has actually been molested, and (2) whether the testimony of a putative molestation victim is credible. The instruction does not require the jury to consider the CSAAS evidence at all, and if the jury does consider it, the instruction does not require or even allow the jury to presume anything, either conclusively or rebuttably. Nor does the instruction in any way shift the burden to Sutherland on any issue. It merely informs the jury of the very narrow issues to which the CSAAS evidence may be considered relevant.

For the foregoing reasons, we reject Sutherland's argument that CALCRIM No. 1193 violates his constitutional rights to due process and a fair trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.